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No. 89-761

In the Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD E. RICE,

Petitioner

v.

OHIO DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

SUPPLEMENTAL APPENDIX

OF COUNSEL:
LOUIS A. JACOBS
3040 Riverside Drive
Suite 201
Columbus, OH 43221
(614) 486-0407

ANDREW J. RUZICHO
3040 Riverside Drive
Suite 201
Columbus, OH 43221
(614) 486-0407

Counsel of Record for Petitioner

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SUPPLEMENTAL APPENDIX

The Petitioner, Edward E. Rice, files his Supplemental Appendix pursuant to Rule 21, Supreme Court Rules, and includes the Memorandum and Order of the United States District Court, Southern District of Ohio, Eastern Division, rendered by Judge Holschuh.

OPINION BELOW

The Memorandum and Order of the United States District Court, Southern District of Ohio, Eastern Division is set forth herein-[1], B-1, et. seq.

[1] Note that §§C(1)(2) of the Memorandum and Order are the only portions relevant to the issues before this Court.
(see pp. B-15 to B-22)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD RICE,	:	
	:	January 22, 1986
Plaintiff,	:	
	:	Case C-2-82-1700
vs.	:	
	:	
OHIO DEPARTMENT	:	
OF TRANSPORTATION,	:	
ET AL.,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Plaintiff brings this action alleging discrimination on the basis of age, political activity, and in retaliation for having filed a previous charge of discrimination with the Ohio Civil Rights Commission (OCRC). The jurisdiction of this Court has been invoked pursuant to 29 U.S.C. §§216, 633a(c) and 28 U.S.C. §§1331(a), 1343(3). This matter is before the Court on defendants' motion for summary judgment and plaintiff's motion for leave to file a supplemental memorandum.

I. FACTS OF THE CASE

Plaintiff is a white male who was fifty-two years of age when this complaint was filed. He has been an employee of the Ohio Department of Transportation (ODOT) since May of 1969. At all times relevant to the complaint plaintiff has been in the position of Personnel Officer which is a classified position. Defendant ODOT is an agency of the State of Ohio. Defendant Weir was Director and defendant McCray was Deputy Director, Administrative Affairs, of ODOT at the time of the filing of the complaint.

On or about September 27, 1976 plaintiff filed a charge with OCRC alleging that defendant ODOT had discriminated against him on the basis of sex. The charge was resolved between the parties.

Subsequently, plaintiff alleges that in August, 1981 he requested a temporary work level increase to the position of Administrative Assistant 4. This position had been temporarily vacated when the then Administrative Assistant took a medical leave of absence. On August 24, 1981 Deputy Director Brayshaw issued an inter-office communication assigning plaintiff to this position. Three days later, however, the communication was rescinded and Deputy Director Brayshaw stated that he (Brayshaw) would handle the Administrative Assistant duties. The deposition of Mr. Brayshaw, however, indicates that plaintiff continued to perform some of these duties. Plaintiff states that he was advised that he could not be placed

in the position because he was a classified employee and the Administrative Assistant was an unclassified position. The Administrative Assistant position became permanently vacated and, on October 18, 1981 Andrew F. Siehl, age twenty-six and the son of the Republican County Chairman of Preble County, Ohio, was appointed to the position.

Mr. Siehl took a temporary leave of absence from September, 1982 through November 22, 1982. Plaintiff claims that he again applied for the temporary position, however, James G. Fife, age twenty-eight and an Administrative Assistant 2, was temporarily promoted to the position. Mr. Fife was a classified employee.

On September 20, 1982 plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging discrimination on the basis of age in regard to the August 1981 and September 1982 incidents. On September 24, 1982 plaintiff filed a charge with OCRC regarding the same incidents alleging that defendant ODOT refused to place him in the position in retaliation for plaintiff's previous charge of discrimination. On December 23, 1982 plaintiff filed the present action.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interroga-

> tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The purpose of the summary judgment procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir. 1978); Felix v. Young, 536 F.2d 1126, 1130 (6th Cir. 1976); United States v. Articles of Device, Consisting of Three Devices . . . "Diapulse", 527 F.2d 1008, 1011 (6th Cir. 1976); Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). Therefore, summary judgment should be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, [and where] no genuine issue remains for trial, [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944). Accord Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962); Associated Press v. United States, 326 U.S. 1, 6 (1945); Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965).

"[T]he question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case . . ." First National Bank v. Cities Service Co., 391 U.S. 253, 259 (1968). The moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it

lodged will be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted). Accord Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472 (1962); Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); Rodgers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965). Similarly, "inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Accord Watkins v. Northwestern Ohio Tractor Pullers Assoc., Inc., 630 F.2d 1155, 1158 (6th Cir. 1980); United States v. Articles of Device Consisting of Three Devices . . . "Diapulse", 527 F.2d 1008, 1011 (6th Cir. 1976); Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965). "Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). Accord Smith v. Hudson, 600 F. 2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979).

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472, (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944). "[T]he issue of material fact required by Rule 56(c) . . . to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that

is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service Co., 391 U.S. 253, 288-9 (1968).

The Supreme Court has stated that "Rule 56 should be cautiously invoked." Associated Press v. United States, 326 U.S. 1, 6 (1945). Similarly, the Sixth Circuit has held: "Although summary judgment is a useful and often efficient device for deciding cases, it must be used only with extreme caution for it operates to deny a litigant his day in court." Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979). Accord Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965) ("[I]t is further clear that summary judgment should be granted with caution . . .").

In some areas of law, summary judgment is especially disfavored. Cases involving motive or intent are ordinarily not susceptible to summary adjudication. Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981); Smith v. Hudson, 600 F.2d 60, 66 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979). Similarly, summary judgment is usually not suitable in cases dealing with antitrust, Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 500 (1969); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Ware v. Trailer Mart Inc., 623 F.2d 1150, 1154 (6th Cir. 1980), or negligence, McTavish v. Chesapeake and O.R.R., 485 F.2d 510, 513 (6th Cir. 1973); Rogers

v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965). In addition, unusually complex cases or those in which the credibility of witnesses is in dispute are only rarely resolved through summary judgment. For examples of unusually complex cases, see In Re Atlas Concrete Pipe, Inc., 668 F.2d 905, 909 (6th Cir. 1982); United States v. Lowell, 557 F.2d 70, 72 (6th Cir. 1977); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193, 1196 (6th Cir. 1974). For examples of cases involving the credibility of witnesses, see In Re Atlas Concrete Pipe, Inc., 668 F.2d 905, 909 (6th Cir. 1982); Willetts v. Ford Motor Co., 583 F.2d 852, 855 (6th Cir. 1978).

Additionally, Rule 56(e) of the Federal Rules of Civil Procedure provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Under Rule 56(e), "a party cannot rest on the allegations contained in his complaint in opposition to a properly supported motion for summary judgment against

him." First National Bank v. Cities Service Co., 391 U.S. 253, 259 (1968) (footnote omitted). The Sixth Circuit has held that

> where a moving party supports his motion for summary judgment by affidavit or other appropriate means, which are uncontroverted, a trial court is fully justified, within the purview of Rule 56 of the Federal Rules of Civil Procedure in granting relief thereon.

Williams v. Baltimore & O.R.R., 303 F.2d 323, 324 (6th Cir. 1962). Accord R.E. Cruise, Inc. v. Bruggeman, 508 F.2d 415, 416 (6th Cir. 1975); Daily Press, Inc. v. United Press International, 412 F.2d 126, 134 (6th Cir.), cert. denied, 396 U.S. 990 (1969).

The uncontroverted facts, however, must conclusively negate the existence of a genuine issue of material fact and establish the moving party's entitlement to judgment. If evidence in support of a motion for summary judgment does not establish a lack of a genuine issue of material fact and conclusively support the moving party's entitlement to judgment, summary judgment is not proper even if no opposing material is present; "unexplained gaps" in material submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes v. S. H. Kress Co., 398 U.S. 144, 157-60 (1970); Smith v. Hudson, 600 F.2d 60, 65 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); Fitzke v. Shappell, 468 F.2pd 1072, 1077-8 (6th Cir. 1972).

III. LEGAL ANALYSIS

A. FAILURE TO TIMELY FILE

Defendants have raised two arguments in support of their position that plaintiff's claim that he was discriminated against in August 1981 is time-barred. First, defendants argue that plaintiff has failed to comply with 29 U.S.C. §626(d). Second, defendants argue that plaintiff has failed to comply with Ohio Revised Code §4112.05. The Court finds these arguments unpersuasive and summary judgment is therefore DENIED on this issue.

1. 29 U.S.C. §626(d)

29 U.S.C. §626(d) requires that a charge of age discrimination be filed within 180 days or, in the case of a deferral state such as Ohio, 300 days of the unlawful practice. See Hall v. Ledex, Inc., 669 F.2d 397 (6th Cir. 1983).

Defendants argue that the alleged unlawful practice occurred on August 27, 1981 when plaintiff received notice that he was not to handle the duties of the Administrative Assistant. As plaintiff's EEOC charge was not filed until September 20, 1982, it is defendants' position that it was beyond the 300 day requirement and should therefore be barred. Plaintiff contends that he was not aware of the pretext until the subsequent 1982 incident when a classified employee was placed in the unclassified position. As such, he argues the statute should be tolled. Plaintiff further argues that the 1982 incident was a con-

tinuing violation of the 1981 incident.

A review of the case law in this area reflects varying responses by the courts when at least one event has been the subject of a timely charge and the court must decide whether the employer can also be held liable for previous events falling outside of the time requirements. See Elliott v. Sperry Rand Corp., 79 F.R.D. 580 (D. Minn. 1978) and cases cited therein. As stated by the court in Elliott:

> [I]t seems that the courts are not really concerned with continuity so much as they are with practically assessing the employment situation from the lay person's viewpoint. The focus is on what event, in fairness and logic should have alerted the average lay person to act to protect his rights, or when he should have perceived that discrimination was occurring.

Elliott, 79 F.R.D. at 585.

Defendants argue that as a Personnel Officer, plaintiff should have known of the personnel policies and laws governing hiring and promotion. Plaintiff argues, however, that he did not become aware of the pretext until a younger classified employee was placed in the Administrative Assistant position. Although it is clear from plaintiff's deposition that he may have had suspicions as to why he did not get the job, the evidence is insufficient for this Court to determine as a matter of law that plaintiff's cause of action for age discrimination arose in August of 1981. See, e.g., Meyer v. Riegel Products Corp., 720 F.2d 303, 308-09 (3d Cir. 1983), cert. dismissed, 104 S. Ct. 2144.

(1984) General Adjustment Bureau, 616 F.2d 785, 790 (5th Cir. 1980).

2. Ohio Revised Code §4112.05

Ohio Revised Code §4112.05 requires that a charge of discrimination be filed with OCRC within six months of the alleged discriminatory act. Defendants argue that plaintiff's failure to so file until September of 1982 should therefore bar plaintiff's 1981 claims.

The six month state statute of limitations is not a bar to plaintiff's claim. 29 U.S.C. §633(b) only requires that state proceedings be commenced, not that they be commenced within the time allotted by state law. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 759 (1979). It is unclear from the record, however, whether plaintiff ever properly commenced state proceedings. The charge which plaintiff filed with the OCRC was based upon retaliation. It does not put the OCRC on notice of any claims of discrimination based upon age and therefore cannot be said to comply with 29 U.S.C. §626(d). The purpose of that section is to give state agencies an opportunity, albeit a limited one, in which to settle the grievances of an ADEA claimant. Oscar Mayer, 441 U.S. at 761.

Notwithstanding this fact, it would still be inappropriate for the Court to grant summary judgment to defendants on this issue. Plaintiff did file a charge of age discrimination with the EEOC on September 20, 1982. Ohio is a deferral state and when a party files a charge

solely with the EEOC, the EEOC will refer the charge to the state agency and hold the charge in abeyance until the sixty days have expired. Love v. Pullman Co., 404 U.S. 522 (1972); Leis v. Opportunity Consultants, 441 F. Supp. 1314, 1316 (S.D. Ohio 1977). There is no evidence before this Court to establish whether the EEOC followed this procedure. Failure of the EEOC to do so would not require dismissal of plaintiff's claim, see, e.g., Toombs v. Greer-Smyrna, Inc., 529 F.Supp. 497, 501 (M.D. Tenn. 1982), aff'd, 709 F. 2d 1509 (6th Cir. 1983); Mitchell v. Mid-Continent Spring Co., 466 F.2d 24 (6th Cir. 1972), cert. denied, 410 U.S. 928 (1973), but would require this Court to hold the case in abeyance until the charge had been properly deferred and the sixty day period had expired. Oscar Mayer, 441 U.S. at 764-65; Mitchell, 466 F.2d at 26-27.

B. PLAINTIFF'S PRIMA FACIE CASE OF AGE DISCRIMINATION

The Sixth Circuit has repeatedly rejected strict adherence to McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) criteria in cases arising under the ADEA. LaGrant v. Gulf & Western Mfg. Co., 748 F.2d 1087, 1090 (6th Cir. 1984); Rose v. National Cash Register Corp., 703 F.2d 225, 227 (6th Cir.), cert. denied, 104 S. Ct. 352 (1983); Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1179 (6th Cir. 1983); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70

(6th Cir. 1982); Schadi v. Reynolds Chemical, 636 F.2d 1116, 1118 (6th Cir. 1980) (per curiam); Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1978). Plaintiff establishes a prima facie case under the ADEA when he presents evidence which "when viewed in the light most favorable to the plaintiff would permit a reasonable jury to find that" he was discharged because of his age. Rose, 703 F.2d at 337.

Although the plaintiff bears the ultimate burden of showing that age was a determining factor, Laugesen, 510 F.2d at 317, it is the defendant at the summary judgment stage of the proceedings who has "the burden of showing conclusively that there exists no genuine issue of material fact." Smith v. Hudson, 600 F.2d 60, 63 (6th Cir. 1979). The evidence must be read together with all inferences to be drawn therefrom in the light most favorable to plaintiff. Id. Although questions of motive or intent are normally not suited to disposition on summary judgment, Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981), cert denied, 456 U.S. 991 (1982), neither may the mere conclusory claim of age discrimination insulate plaintiff from summary judgment or establish plaintiff's prima facie case. Locke v. Commercial Union Insurance Co., 676 F.2d 205, 206 (6th Cir. 1982). The Court may grant the motion "if it determines that no evidence has been presented indicating that a discriminatory purpose was a motivating factor." Kendall v. The Hoover Co., 751 F.2d 171, 173 (6th Cir. 1984).

In regard to the 1981 incident, plaintiff has stated that he was in the protected age group, he was qualified for the position of Administrative Assistant, his supervisor was aware of his interest in the position, he was advised by interoffice communication that he would fulfill the duties of the position, this communication was rescinded three days later, and Mr. Siehl, age 26, was then placed in the position. Plaintiff has also stated that he was advised that he could not have the position because a classified employee could not be placed in an unclassified position but that this reason was, in fact, a pretext. No issue has been raised as to plaintiff's age or qualifications. Although defendants have argued that the position was unclassified and therefore there was no requirement to seek applicants for the position, neither may defendants use age as a criteria in their decision making process.

In regard to the 1982 incident, construing the complaint most favorably to the plaintiff, he argues that he again applied for the position and that it was given to Mr. Fife, age twenty-eight, who, like plaintiff, was a classified employee. Although defendant states that plaintiff did not apply until after the position had already been filled, an issue still has been raised as to whether age was a factor in the decision not to choose plaintiff for the position.

Accordingly, in that genuine issues of material fact exist as to plaintiff's age discrimination claim, summary judgment on this issue is inappropriate.

C. DISCRIMINATION ON THE BASIS OF POLITICAL ACTIVITY UNDER 42 U.S.C. §§1983, 1985 AND 1988

1. 42 U.S.C. §1983 — Political Activity

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The required elements to state a section 1983 claim were set out by the Supreme Court in Gomez v. Toledo, 446 U.S. 635, 640 (1980):

> By the plain terms of §1983, two – and only two – allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

The first inquiry, therefore, is whether plaintiff has been deprived of a right secured by the Constitution and laws of the United States. See Maine v. Thiboutot, 448 U.S.

1, 7 (1980); Baker v. McCollan, 443 137, 140 (1979).

Plaintiff alleges that defendants intentionally discriminated against him by falling and refusing to promote him to an unclassified position on the basis of his lack of political activity. He argues that although he is a Republican, and the defendants are Republicans, he was disfavored for the promotion because he did not contribute to the Republican Party.

As an initial matter, it must be decided whether Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), the two Supreme Court decisions which have dealt with the patronage system, are applicable to the present controversy. The limited plurality decision in Elrod was that a nonpolicymaking, nonconfidential government employee could not be discharged or threatened with discharge from a job he or she was satisfactorily performing upon the sole ground of political beliefs. Elrod, 427 U.S. at 375 (Stewart, J., concurring). In Branti the Court held that political affiliation could be a factor in a discharge only where the affiliation was an appropriate requirement for the effective performance of the office. Branti, 445 U.S. at 517-18. The decision, as in Elrod, was limited to discharges, id. at 513, fn. 7, and the majority of lower courts have refused to expand it to include other employment decisions. See, e.g., Avery v. Jennings, 604 F. Supp. 1356, 1362 (S.D. Ohio 1985) (refusal to rehire); Messer v. Curci, 610 F. Supp. 179, 183 (E.D. Ky. 1985) (refusal to hire); Horn v. Kean, 593 F. Supp. 1298, 1301

(D.N.J. 1984) (protection not to be expanded beyond public employees); Note, First Amendment Limitations on Patronage Employment Practices, 49 U. Chi. L. Rev. 181 (1982). Even those courts which have expanded Elrod and Branti have done so in a very narrow fashion. See, e.g., Delong v. United States, 621 F.2d 618, 623 (4th Cir. 1980) (applied where transfer amounted to "substantial equivalent of dismissal"); Auriemma v. City of Chicago, 601 F. Supp. 1080, 1086 (N.D. Ill. 1984) (applied to demotion from a high-ranking position, coupled with a pay cut). This Court is in agreement with the courts of this circuit that Elrod and Branti represent "a very narrow subclass... of cases involving discharge from public employment as a result of the exercise of first amendment rights." Avery, 604 F. Supp. at 1362.

It is more appropriate, therefore, to consider plaintiff's claim under a traditional first amendment analysis as set out in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). In Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439, 442-43 (6th Cir. 1981), cert. denied, 456 U.S. 910 (1982) the Sixth Circuit set forth the Mt. Healthy criteria as follows:

1. whether plaintiff's conduct deserves constitutional protection;

2. if so, whether the protected conduct was a "substantial factor" or a "motivating factor" in the employer's decision;

3. if so, whether the complained of action would have taken place absent the protected conduct.

Consideration of the first step requires a clear understanding of the precise issue which is before this Court. Accepting plaintiff's allegations as true, he states that the Republican Party has a policy of preferring contributing Republicans over noncontributing Republicans in hiring decisions. The document which plaintiff has attached to his memoranda provides, "In every instance the District will attempt to hire (when a choice exists) a Republican who has worked and contributed in preference to a 'single' vote." (Exhibit J to plaintiff's memorandum in opposition). Plaintiff states that he did not contribute to the party. Plaintiff is a classified employee and therefore part of the civil service system. The position in question was that of Administrative Assistant which is an unclassified position. Even taking as true plaintiff's statement that defendants knew of his interest in the position, it is also undisputed that no applications were taken and that a person in an unclassified position serves at the discretion of the Director. O.R.C. §§121.11, 124.11(A).

The issue before this Court, therefore, is whether a classified employee's claim that he did not receive a promotion into an unclassified position because of his "nonconduct," i.e., not contributing to his own political party, should be considered expressive conduct deserving of first amendment protection. The issue is not one of

right of association in that plaintiff and defendants are of the same political persuasion. In short, plaintiff, whose freedom of association and freedom of speech have not been abridged by defendants, seeks to have the Court compare the amount of contributions of money or work given by different persons to the same political party and to find a constitutional deprivation of employment opportunities based upon a disparity in those contributions. It is the opinion of this Court that to find in plaintiff's favor would be to overly extend the first amendment and "would involve the federal courts in a myriad of personnel decisions at state and local level[s] that would contravene the spirit of the Tenth Amendment." Messer, 610 F. Supp. at 184.

The primary concern of the first amendment is the full protection of speech upon issues of public concern. Connick v. Myers, 461 U.S. 138, 154 (1983). It has also long been recognized that speech may be nonverbal. Stromberg v. California, 283 U.S. 359 (1931) (unconstitutional to prohibit displaying red flag as sign of opposition to organized government); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (Jehovah Witness children cannot be compelled to salute flat); Brown v. Louisiana, 383 U.S. 131 (1966) (right to have peaceful sit-in at segregated public library); United States v. O'Brien, 391 U.S. 367 (1968) (burning draft card as having communicative element sufficient to bring first amendment into play). An important aspect of symbolic speech is the

intent to express an idea. O'Brien, 391 U.S. at 376. In each of the above-cited cases the actions taken were sufficiently definitive that the Court could presume an intent to communicate. In the present case, however, the mere fact that plaintiff did not make a contribution to his own political party conveys no such message. As compared to refusing to salute a flag, a failure to contribute could just as easily be due to lack of funds or forgetfulness as it could be an expression of public concern. Nor has plaintiff ever asserted that he intended his noncontribution to act as a statement or that he was attempting to express an opinion. This Court is unwilling to find that his non-action reflects an intent to communicate and should therefore be considered expressive conduct within the ambit of the first amendment.

Additionally, this Court must keep in mind "the practical realities involved in the administration of a government office." Connick, 461 U.S. at 154. Government offices could not function if every employment decision became a constitutional matter. Id. at 143. In Landrum v. Eastern Kentucky University, 578 F. Supp. 241, 247 (E.D. Ky. 1984) the court recognized that "the First Amendment in the employment context is now to be more narrowly interpreted to give greater scope to the legitimate rights of governmental entities as employers." This same concern was expressed by the court in Messer when it refused to expand Elrod to encompass hiring procedures. "[A]pplying the Elrod decision to hiring would be likely

to involve local government officials in numerous lengthy trials concerning the merits of disappointed job seekers. This would impose burdens on local government that were unacceptable to the majority of the Justices in Elrod." Messer, 610 F. Supp. at 183. The same reasoning applied with equal — if not greater — force in cases involving disappointed promotion seekers.

Plaintiff having failed to meet the first step of the Hildebrand analysis, his claim of discrimination on the basis that he did not financially support his own political party must be dismissed.

2. 42 U.S.C. §1983 — Retaliation

Plaintiff further argues that he was denied the promotion because he had previously filed a civil rights charge. He argues that he is therefore entitled to bring a claim of retaliation under 42 U.S.C. §1983. This argument, however, has been considered and rejected by the Sixth Circuit in a case with very similar facts.

In Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984), plaintiff brought suit under Title VII, 42 U.S.C. §1981, and 42 U.S.C. §1983. He claimed that he was denied a promotion in retaliation for filing discrimination charges. In looking to the legislative history of the 1972 amendments which brought federal, state and local employees within the protection of VII, the court determined that Congress did not intend to preclude these employees from bringing suit under section 1983 for

"constitutional violations or for violation of statutes which protected such employees before the enactment of the 1972 amendments." Id. at 1204. As an example, the court pointed to Grano v. Department of Development, City of Columbus, 637 F.2d 1073 (6th Cir. 1980) where plaintiff was permitted to proceed under Title VII and section 1983 on her claim that defendant failed to promote her on the basis of sex. In Day, however, plaintiff's sole claim was based upon retaliation, which derives solely from Title VII. The Court therefore held that when the sole basis of a plaintiff's claim is retaliation, it cannot be the basis for a section 1983 claim. Id. at 1205.

For the foregoing reasons, it is the opinion of this Court that plaintiff has failed to state a claim upon which relief may be granted under 42 U.S.C. §1983 and this Court must therefore be DISMISSED.

3. 42 U.S.C. §1985

Plaintiff also alleges a conspiracy to deprive him of his constitutional rights under 42 U.S.C. §1985. Although plaintiff has not cited the specific portion of section 1985 which has been violated, it must be presumed from the facts that 42 U.S.C. §1985(3) is being invoked. That section makes it a federal tort for two or more persons to "conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal

protection of the laws, or of equal privileges and immunities under the laws . . ."

In considering the elements of a cause of action under section 1985(3), the Supreme Court has held that a plaintiff alleging a violation of that provision must establish some racial or otherwise "class-based, invidiously discriminatory animus" behind the conspirators' action. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). In a detailed analysis of the Griffin requirement, the Sixth Circuit Court of Appeals has held that only members of classes which are traditionally entitled to protection under the Equal Protection Clause of the Fourteenth Amendment are proper plaintiffs of actionable claims under section 1985. These classes include "discrete and insular minorities" and individuals who join together for the purpose of asserting fundamental rights. Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980). The class must be a discrete group which suffers "the sort of prejudice 'which tends . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities' in our society." Id. at 1153 (citations omitted). The essential allegation in a section 1985 action is that defendants conspired against plaintiff because plaintiff is a member of a class which is defined by its assertion of a fundamental right. In Re Jackson Lockdown/MCO Cases, 568 F. Supp. 869, 882 (E.D. Mich. 1983). The statute does not reach situations where the discrimination is sparked by personal animosity because of individual conduct in

exercising a constitutional right, rather it applies only when the animus is sparked by a peculiar and unique manner of exercising a fundamental right. Browder v. Tipton, 630 F.2d at 1154. The distinction between protected and unprotected classes is "rooted somewhere in traditional equal protection analysis." Id. at 1152.

In regard to plaintiff's political activity claim, there is no indication that plaintiff is a member of any class which has historically been entitled to Fourteenth Amendment protection. The alleged denial of plaintiff's rights under the equal protection clause was not based upon his membership in some racial, religious, or political group. Plaintiff has not alleged that he is a member of a group exercising a fundamental right in some unique or peculiar fashion. Plaintiff's sole claim is that his own political party preferred to appoint a contributing Republican over a noncontributing Republican into an unclassified position. This is insufficient to state a cause of action under section 1985(3). Accord, Sellers v. Local 1598, 600 F. Supp. 1205, 1212 (E.D. Pa. 1984) ("Section 1985(3) was not meant to regulate combat between political parties and among the factions of which parties are composed.") Since there has been no showing of a "class-based, invidiously discriminatory animus," Griffin, 403 U.S. at 102, plaintiff's lack of political activity claim under section 1985 must be dismissed.

Nor does plaintiff's claim of age discrimination state a cause of action under section 1985(3). The Supreme

Court's reasoning in Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979), where it held that the deprivation of a right created by Title VII could not be the basis for a section 1985(3) cause of action, is equally applicable to plaintiff's age claim which arises under the ADEA, 29 U.S.C. §§621 et seq. To do so would be to undermine the comprehensive plan set out by Congress to remedy claims of age discrimination. To permit plaintiff to proceed under section 1985(3) would permit him to avoid these detailed and specific provisions of the law. Accord Seidel v. Chicago Savings & Loan Association, 544 F. Supp. 508 (N.D. Ill. 1982) (no cause of action under Section 1985(3) for claims of sex and age discrimination); Lyon v. Temple University of the Commonwealth System or Higher Education, 507 F. Supp. 471, 478 (E.D. Pa. 1981) (Novotny analysis equally applicable to claims under Equal Pay Amendments to Fair Labor Standards Act).

For the foregoing reasons, plaintiff's claim of discrimination based upon lack of political activity and age under 42 U.S.C. §1985(3) are hereby DISMISSED.

4. U.S.C. §1988

Although plaintiff has also claimed a cause of action under 42 U.S.C. §1988, that section is only "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights."

Moore v. County of Alameda, 411 U.S. 693, 702 (1973). It also provides for an award of attorney fees in certain actions. Insofar as this Court has dismissed plaintiff's claims under 42 U.S.C. §§1983 and 1985, it is also appropriate to dismiss plaintiff's claim under 42 U.S.C. §1988.

D. MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

In his motion plaintiff moves for leave to file a supplemental memorandum to provide additional evidence of retaliatory conduct on the part of defendants. Insofar as this Court has already determined that a claim of retaliation must be brought under Title VII and does not state a cause of action under 42 U.S.C. §1983, the motion is hereby DENIED.

E. CONCLUSION

For the foregoing reasons, the Court takes the following actions

1. defendants' motion for summary judgment in regard to plaintiff's claim or age discrimination under 29 U.S.C. 216, et seq., DENIED;

2. defendants' motion for summary judgment in regard to plaintiff's claims of retaliation and lack of political activity under 42 U.S.C. §1983 is GRANTED and those claims are DISMISSED;

3. defendants' motion for summary judgment in regard to plaintiff's claims of conspiracy under 42 U.S.C. §1985 is GRANTED and those claims are therefore DISMISSED;

4. defendants' motion for summary judgment in regard to plaintiff's claim under 42 U.S.C. §1988 is GRANTED and that claim is therefore DISMISSED.

5. plaintiff's motion for leave to file a supplemental memorandum is DENIED.

IT IS SO ORDERED.

(signed)

John D. Holschuh, Judge
United States District Court